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Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1946.

No. 862

17

THE UNITED STATES, *Petitioner,*

v.

JOHN J. FELIN & Co., Inc.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT.

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IN SENATE

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OPINION BELOW.

The opinion of the Court of Claims (R. 12-14) is reported at 67 F. Supp. 1017.

JURISDICTION.

The judgment of the Court of Claims was entered on October 7, 1946 (R. 15). The petition for a writ of certiorari was filed on January 7, 1947, and was granted on March 3, 1947 (R. 16). The jurisdiction of this Court rests upon Section 3(b) of the Act of February 13, 1925, as amended.

STATUTE INVOLVED.

The statute involved is the Act of October 16, 1941 (c. 445, 55 Stat. 742) as amended by the Act of March 27, 1942 (c. 199, 56 Stat. 181), the pertinent provisions of which in effect at the time of the requisition are set forth in the Appendix to this brief.

QUESTION PRESENTED.

Whether in a suit for just compensation under the Fifth Amendment, brought by the owner of pork cuts requisitioned by the United States, compensation may justly and fairly be measured by maximum selling prices prescribed by the Price Administrator when such prices—

- (1) would not buy the products in the market,
- (2) were below the cost of production and below the value of such cuts reflected by the live hog market,
- (3) were less than willing buyers and sellers would have fixed as the value in the absence of governmentally prescribed maximum prices,
- (4) were the subject of general protest by the meat packing industry as unfair and unreasonable and below the actual value of the products, and
- (5) were so low that, as found by the Price Administrator, if continued without the grant of relief "many pork packers would be forced sharply to curtail their kill or discontinue it entirely" because of the losses imposed;

or whether just compensation requires an award equivalent to the actual value of the property requisitioned as disclosed by the cost at which these staple and commonplace pork cuts were readily replaced in the regular course of business by the slaughter and conversion into cuts of live hogs purchased in the free and general market where the Price Administrator had seen fit to leave prices and value to be freely determined by willing buyers and sellers.

STATEMENT.

The statement of the case in petitioner's brief, while accurate in the detailed statements, fails to deal with the central part of the case, namely, the actual value of respondent's products and the extraordinary character of the so-called "market prices" which the petitioner urges this Court to accept as the measure of just compensation under the Fifth Amendment. It is necessary, therefore, for respondent to supplement the statement made in petitioner's brief.

The so-called "market prices" urged by petitioner were not the result of trading by willing sellers and willing buyers in a free market and lacked all the attributes of prices so determined. These "market prices" did not represent anyone's opinion as to the *value* of the products. They were merely the maximum selling prices prescribed by the Price Administrator in Revised Maximum Price Regulation No. 148 and Amendment 1 thereto, covering wholesale pork cuts (Fdg. 11 and 12, R. 7-8). Sales at higher prices were made unlawful and subject to criminal penalties (Fdg. 12, R. 7-8). Such maximum prices had been originally established March 23, 1942, based on prices prevailing during the period March 3, 1942 to March 7, 1942. Prices at the same level were continued in effect and were being maintained by Revised Maximum Price Regulation No. 148 and Amendment 1 thereto at the time respondent's property was requisitioned one year later on March 3, 1943 (Fdg. 12, R. 7-8).

The principal item in the cost of producing pork cuts is the cost of live hogs from which they are derived (Fdg. 11, R. 7). In the period March 3, 1942 to March 7, 1942, employed as the base price period, the average price of live hogs at Chicago was \$13.15 per cwt. Chicago is one of the largest hog markets in the country. That market provides the basic quotations in the packing industry and such prices are generally used for arriving at prices in other market centers (Fdg. 13, R. 8). No maximum prices had been pre-

scribed for live hogs, the prices being left to be determined by the free trading of buyers and sellers. Within the first month after pork cut prices were imposed, the average price for live hogs had increased to \$14.03. The price trend continued upward, and although there was a price decline during the heavy marketings in November and December, 1942, the price started rising again in the latter part of December, 1942 and reached an average of \$15.59 per cwt. during March, 1943. For the week ending March 6, 1943, in which the requisition took place, the Chicago average price was \$15.60 per cwt., the highest price level attained since October 1920 (Fdg. 13, R. 8).

The maximum prices maintained by the Price Administrator on products derived from live hogs were during February and March, 1943, less than the market prices of live hogs. The Court of Claims found:

"During the months of February and March 1943 the wholesale prices for products derived from live hogs were, as shown by the published reports of the Department of Agriculture, less than the market prices of live hogs." (Fdg. 14, R. 8).

The Director, War Food Administration, charged by the President of the United States with full responsibility for the Nation's food program in order to assure an adequate supply and distribution of food to meet war and essential civilian needs (Fdg. 14, R. 8; Fdg. 2, R. 5), issued on April 10, 1943 an official public statement referring to the "continued 'squeeze'" between the price of live animals and the wholesale prices of products and "the exceptionally acute situation resulting from present relatively high hog prices." The announcement contained the following statement (Fdg. 14, R. 8-9):

"Current prices for livestock are above the levels reflecting a proper relationship to the existing wholesale meat ceilings."

After reciting that the meat rationing program, "together with vigorous enforcement measures which are de-

signed to keep meat supplies moving through legitimate trade channels," were expected to result "in lower prices for all classes of livestock as these programs become fully effective," the statement continued:

"However, if these measures do not result in a downward adjustment in hog prices in a reasonable time, it will be necessary to adopt ceiling prices on live hogs. In view of the exceptionally acute situation resulting from present relatively high hog prices, procedures for placing ceiling prices on hogs are now being worked out for use if and when necessary. Recent hog prices have been \$1.00 to \$1.50 per cwt. above levels reflected by current wholesale pork ceilings."

Ceiling prices on live hogs were finally imposed by the Price Administrator six months later by the promulgation of Maximum Price Regulation No. 469, issued September 11, 1943 and effective October 4, 1943 (Fdg. 15, R. 9). The Price Administrator, in his statement of considerations involved in the issuance of this regulation, after referring to the regulation fixing maximum prices on wholesale pork cuts and the rise in hog prices since March, 1942, made the following finding:

"However, the hog price continued to rise, the average reaching \$14.99 in August [1942], with a top of \$15.30. It became clear that this increase was causing some packers to sell at a loss under their wholesale pork ceilings and that, if prices continued to rise, or even remained at August levels, many pork slaughterers would be forced sharply to curtail their kill or to discontinue it entirely."

After reciting the price history of live hogs for the following year, the tendency of prices to rise above \$15.00 per cwt. except for short seasonal periods, and the failure of indirect controls—wholesale and retail price ceilings, rationing and slaughter restrictions—to restrain hog prices, the Price Administrator stated his conclusion that maximum prices for hogs were necessary (Fdg. 15, R. 9-10).

At the time respondent's pork cuts were requisitioned the average price of hogs had increased to \$15.60 per cwt., well above the \$15.00 level at which the Price Administrator found losses would force packers "sharply to curtail their kill or to discontinue it entirely."

The maximum prices on pork cuts maintained by the Price Administrator were the subject of general protest by the meat packing industry in both 1942 and 1943. On several occasions in this period protests were made on behalf of 650 meat packing company members of the National Independent Meat Packers Association, of which respondent was a member. Respondent individually filed a formal protest on July 17, 1942, and again on March 18, 1943 (Fdg. 16, R. 10).

Respondent's protests were denied by the Price Administrator in orders and accompanying decisions on April 23, 1943 and July 5, 1943 (Fdg. 17, R. 10). The grounds given by the Price Administrator for the dismissal are not set forth in the findings or decision of the Court of Claims but are quoted, in part, by petitioner as found in the decision of the Price Administrator (Pet. Brief, p. 27). The ground of dismissal by the Price Administrator of respondent's protests and the protests of 130 other packing companies,* as more fully shown by the decisions on the protests, was that the increase in hog costs did not warrant any change in the maximum prices for pork products. In the decision of July 5, 1943 it was said that the only basis on which any change in pork prices would be made was a showing of need for higher prices—

"... in terms of the over-all financial position of the industry."

The Price Administrator found that the protestants had not shown that the packing industry as a whole needed in-

* Decision issued April 23, 1943, *Rapides Packing Co. et al.*, Docket No. 1148-2-P, and decision issued July 5, 1943, *Greenwood Packing Plant et al.*, Docket No. 1148-188-P.

creased earnings when all operations of the entire industry were taken into consideration, and on this basis dismissed the protests. In his decision the Price Administrator also referred to various controls which were being imposed or had been imposed which he then believed might restore a fair relationship between the ceiling prices and live hog costs. Among the other controls mentioned which it was then hoped would eliminate the price squeeze were—

Rationing of consumers effective March 29, 1943 (Ration Order No. 6, 8 F. R. 3591);

Licensing of all dealers in livestock and all slaughterers;

Limitation of slaughter by packers for civilian distribution by means of quotas (Food Distribution Orders Nos. 27 and 28, 8 F. R. 2785 and 2787);

Establishment of dollars and cents ceiling prices for retail sales of pork products, effective April 1, 1943 (8 F. R. 2859);

Vigorous enforcement program against black market operators, with 10,000 investigations, 1,000 enforcement proceedings, and 1,300 defendants.

The decision stated:

“Purchase of live animals by black market operators have been at prices which ignored maximum prices established for dressed pork and wholesale cuts. The effect of this competition on live prices has been greater than its volume would appear to warrant. Enforcement of maximum prices and quota limitations will restore normal competitive relationships in the live market and permit acquisitions of supplies at price levels consistent with maximum prices established. Altogether, cooperation of the industry, exercise of the administrator's authority and that of the other government agencies dealing with this problem, are aimed at control of prices in a manner which will effectuate the purposes of the Act to prevent inflation.”

Before two months had elapsed the Price Administrator had concluded that with hog prices at \$15.00 per cwt. the established maximum prices for pork products would force many slaughterers "sharply to curtail their kill or to discontinue it entirely." Ceiling prices on hogs were therefore issued September 11, 1943 (Fdg. 15, R. 9). Hogs were costing on the average \$15.60 when respondent's products were requisitioned (Fdg. 13, R. 8).

During the period in which respondent's products were requisitioned, the so-called "market prices" for pork cuts as found in the maximum price regulation of the Price Administrator would not buy the products in the market. Respondent attempted to purchase pork cuts in the market to replace those requisitioned but was unable to do so. The Court of Claims found that the only means whereby respondent might obtain these products was through the purchase and slaughter of live hogs (Fdg. 19, R. 11). The Food Distribution Administration, as purchasing agent for various Government departments and agencies, was having difficulty in obtaining its requirements (Fdg. 18, R. 10-11). The record discloses no purchases by the Government in the market or without the aid of compulsory orders. During February and March, 1943 the Food Distribution Administration was procuring meat by issuing to each packer operating under Federal inspection a priority order calling for a proportionate part of the total quantity needed at the time. These priority orders had the effect of requiring packers to fill them prior to the filling of other orders (Fdg. 3, R. 5) and wilful failure to observe them was subject to criminal prosecution.* However, the difficulty in getting pork products was so great that on March 13, 1943, the Director, Food Distribution Administration, issued an order which required each slaughterer subject to Federal inspection to set aside for government use 45 percent of all pork and designated percentages of other meat derived from the

* Title III of the Second War Powers Act (Act of March 27, 1942, c. 199, Title III, Sec. 301, 56 Stat. 177; 50 U. S. C. App. Supp. II, 633). See Petitioner's brief, p. 5, footnote.

slaughter of hogs and other livestock (Fdg. 18, R. 10-11). Disregard of this order was also punishable as a crime.**

The Government was unable to show the court below any ready or willing sellers of pork cuts in the market at the maximum prices maintained by the Price Administrator. The Court of Claims did find that at the time of the requisition "there was a ready market for such products in Philadelphia" (Fdg. 20, R. 11) but this means only that there were willing buyers. The finding as to a "ready" market must be read with the court's other finding that respondent was unable to purchase pork cuts in the market at the same time although it sought to do so. (Fdg. 19, R. 11) In addition, the finding of a "ready" market must be read along with the further findings that there existed "an acute shortage of pork products available for the civilian population" and as to the compulsory methods being employed by the Government to obtain these products (Fdg. 18, R. 10-11).

Respondent readily conceded, and the Court of Claims found, that prior to and after the requisition it regularly sold pork cuts at the established maximum prices (Fdg. 20, R. 11). Respondent did this, not because it considered such prices reasonable or fair (it had formally protested them as unreasonable), or because it did not consider the products to have a greater value, but because they were the highest legal prices which it was allowed to charge its customers. The company did not continue operations in order to obtain the allowable maximum prices for pork products but for other reasons found by the court as follows (Fdg. 20, R. 11):

"Throughout the period mentioned, plaintiff continued to buy live hogs at prevailing prices and to sell pork products derived from them at the ceiling prices authorized by regulations of the Office of Price Administration, even when the cost of live hogs was

** This set-aside regulation was issued by the Director, War Food Administration, under authority of the Second War Powers Act (cited next footnote, *supra*), Executive Order No. 9280 (7 F. R. 10179) and Executive Order No. 9334 (8 F. R. 5423).

greater than the wholesale prices of the products obtained from them. Plaintiff chose to do this in order to protect its good will and the investment in its business, in order to supply customers who were dependent on it and in order to retain its organization of plant and company employees at a time when the labor situation in Philadelphia was very tense."

There is no finding by the court below that respondent, the Price Administrator, or anyone else, considered the value of respondent's pork cuts to be no greater than the prescribed maximum prices or that the value was less than the cost of obtaining them by the purchase and slaughter of live hogs. In fact, the value of pork cuts was contemporaneously being expressed by the free trading of willing sellers and willing buyers in the general live hog market, the only place in which such cuts were obtainable. Pork cuts were readily obtainable by respondent in the regular course of business by the purchase and slaughter of live hogs. The award to respondent by the Court of Claims is based upon the cost at the time of requisition of obtaining the requisitioned products in the regular course of business by the slaughter of live hogs purchased in a free and fair market.

The Government seeks a valuation of the requisitioned products at \$25,112.50, which is less than the highest "market price" allowed by the Price Administrator. (Pet. Brief, pp. 21, 42) This is produced by taking the applicable maximum prices and subjecting them to a deduction of \$1.00 per cwt. for sales in carload quantities, as provided by the price regulation for voluntary sales. Respondent customarily sold its products in lots of less than 500 pounds each, for which the Price Administrator had provided higher "market prices." Its customers were approximately 5,000 retail meat dealers located in the Philadelphia area, which it served by means of 57 route trucks. In lots of less than 500 pounds, the applicable maximum prices under the regulation aggregated \$26,362.50 for the requisitioned products (Fdg. 22, R. 11-12). The award by

the Court of Claims, based on the cost of obtaining the cuts by the purchase and slaughter of live hogs, was \$30,293 (Fdg. 19, R. 11).

The petition was filed in the Court of Claims on June 24, 1943 (R. 1).

SUMMARY OF ARGUMENT.

1. The determination of just compensation under the Fifth Amendment is a judicial function not subject to control or limitation by regulation of the Price Administrator.

2. The rule of employing market price in measuring just compensation can be applied only where it is judicially determined that such market price or prices provide "the full money equivalent of the property taken" and place the owner "in as good position pecuniarily as it would have occupied if its property had not been taken." *United States v. New River Collieries Co.*, 262 U. S. 341, 343.

3. The so-called "market prices" maintained by the Price Administrator on the requisitioned products were less than their actual value and were less than the "full money equivalent of the property taken." The prescribed prices expressed no one's opinion of the actual value of the pork cuts. Such prices would not buy the products in the market. They were below the value which willing sellers and willing buyers would have established in a free and fair market. They were below cost of production although demand for pork cuts far exceeded the supply. In the face of heavy demand for products the prescribed prices imposed such heavy losses on slaughterers as to threaten to force them to discontinue operations. These prices were substantially less than the price and value which willing buyers and willing sellers were placing on these products contemporaneously in free trading in the general live hog market where pork cuts were readily available to respondent in the regular course of business.

4. The "full money equivalent" of the requisitioned pork cuts is measured with logical and mathematical exactness

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4. The "full money equivalent" of the requisitioned pork cuts is measured with logical and mathematical exactness

by the cost at which these staple and commonplace products were readily replaced by respondent in the regular course of business by the purchase and slaughter of live hogs. The "money equivalent" of a staple and commonplace article, *readily replaceable*, is demonstrated by the cost of replacement in the regular course of business. Any award of less than this replacement cost would fail to place respondent "in as good position pecuniarily as it would have occupied if its property had not been taken."

5. This Court has held in many cases that replacement cost is to be considered in arriving at value. *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 124-125. It has also held that where two markets exist the owner is entitled to the value in the higher of the two markets. *United States v. New River Collieries Co.*, 262 U. S. 341. This latter rule would seem to apply with special force here when the so-called "market prices" prescribed by the Price Administrator for one market would not buy the products whereas the products were readily available in the second market at prices determined by the free trading of willing sellers and willing buyers.

6. The ruling of the Court of Claims in this case and respondent's position here cannot embarrass the Congressional purpose as expressed by the Emergency Price Control Act of 1942. Congress expressly excluded requisitioned property and compulsory sales from the terms of that Act.*

The "market price" prescribed by the Price Administrator cannot control or limit the independent judicial determination of just compensation under the Fifth Amendment.

The argument for petitioner is that the "market price" imposed by the Price Administrator determines and controls the measure of just compensation. If this argument

* "Nothing in this Act shall be construed to require any person to sell any commodity . . ." (c. 26, title I, sec. 4, 56 Stat. 28; Supp. II (1942), U. S. Code, title 50, sec. 904).

be accepted the guarantees of the Fifth Amendment have been effectively set aside and suspended by regulation of the Price Administrator and the judicial function may be exercised only within the limits allowed by the Price Administrator. The contention cannot be seriously entertained. It is too long and well established, as fundamentals of our government, *first*, that the guarantees of the Fifth Amendment are not suspended in time of war** and, *second*, that the determination of just compensation under the Fifth Amendment is a judicial function not subject to control by the legislative or executive departments.*** "The ascertainment of compensation is a judicial function, and no power exists in any other department to declare what the compensation shall be, or to prescribe any binding rule in that regard." *United States v. New River Collieries Co.*, 262 U. S. 341, 343-344. This Court in passing upon the validity of a price regulation for a general class was careful to point out that the case before it did not involve a "taking of property" by the Government. *Bowles v. Willingham*, 321 U. S. 503, 517. By doing so the Court put to one side the different question which would arise in such a case and reserved for determination whether a different rule should apply.

It was not the intention of Congress that the prices prescribed by the Price Administrator should govern in the requisition of property or in compulsory sales. This is shown on the face of the Emergency Price Control Act by the following provision:

"Nothing in this Act shall be construed to require any person to sell any commodity . . ." (c. 26, title I, sec. 4, 56 Stat. 28; Supp. II (1942), U. S. Code, title 50, sec. 904)

This provision is meaningless if, upon requisition, the owner's recovery is controlled by the price fixed by regulation of the Price Administrator.

** *Ex parte Milligan*, 4 Wall. 121; *United States v. Cohen Grocery Co.*, 255 U. S. 88.

*** *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 327.

The purpose of Congress is further shown by the amendment of the Act of October 16, 1941, under which the requisition here took place. The statute originally provided that the recovery in case of requisition should be on basis of "the fair market value." (c. 445, 55 Stat. 742; Supp. I (1941), U. S. Code, title 50, sec. 721) The Price Control Act became effective January 30, 1942. Thereafter, on March 27, 1942, the Act of October 16, 1941, was amended, the provision for recovery on basis of "the fair market value" was eliminated, and in lieu thereof it was provided that recovery should be "in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States." (c. 199, 56 Stat. 181; Supp. II (1942), U. S. Code, title 50, sec. 721)

The extended argument in petitioner's brief (pp. 33-41) to the effect that the decision below disregards the Emergency Price Control Act of 1942, "frustrates the Congressional purpose," and "would render impossible the maintenance of any effective price control system," is conclusively answered by the actions of Congress in placing requisitions and compulsory sales outside the scope of the Price Control Act and by the amendment of the requisitioning Act of October 16, 1941. By these actions Congress took affirmative steps to assure observance of the guarantees of the Fifth Amendment.

"Market price" is not acceptable as a judicial measure of just compensation unless it qualifies as the "full and perfect equivalent" in money of the property taken.

The guarantee of the Fifth Amendment is that *just* compensation shall be paid. The judicial function, therefore, involves more than a clerical determination of market price and the automatic acceptance of such determination as the measure of compensation. The argument for the Government is, in substance, that the determination of market price ends the inquiry without any investigation to determine whether such price represents *actual* value and, therefore,

just compensation. The limited and mechanical inquiry urged on behalf of the Government disregards the basic requirement that the compensation shall be the "full and perfect equivalent" in money of the property taken and that the owner shall be fully indemnified so as to place him in as good a position "as he would have been in if his property had not been taken." *United States v. Miller*, 317 U. S. 369, 373. It is only where "market price" satisfies this basic requirement that it can be employed as a judicial measure of just compensation under the Fifth Amendment.

For convenience and as a practical measure of actual value, the courts have accepted and employed market value in numerous cases as the measure of just compensation under the Fifth Amendment but the Government's brief has failed to cite any case in which such market price or value was employed where it did not represent actual value and the full and perfect equivalent of the property taken. We know of no case in which the market price or value has been employed where, in fact, it did not represent the full and perfect equivalent of the property taken. In *United States v. Miller*, *supra*, 373-374, this Court said:

"It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the 'value,' the 'market value,' and the 'fair market value' of what is taken. The term 'fair' hardly adds anything to the phrase 'market value,' which denotes what 'it fairly may be believed that a purchaser in fair market conditions would have given,' or, more concisely, 'market value fairly determined.' "

It will be observed from the quotation that the Court emphasized the use of a price or value arrived at "in fair market conditions." Underlying the use of market value as a fair measure of just compensation is the common

knowledge that in a *free* market composed of willing sellers and willing buyers there occurs a practical and realistic appraisal of actual value. A market price or value under conditions where sellers and buyers do not appraise the true and actual worth of a commodity cannot be accepted as a measure of actual value; and this is particularly true, as in the present case, where prices are by government order held below the cost of production for a substantial period. It is common knowledge that producers of goods do not produce goods for the purpose of selling them at a loss. This is not a case where market conditions and the relation of supply to demand have forced selling prices below the cost of production so that the actual worth and value of the product is below the cost of production. On the contrary, demand far exceeded the supply. The facts here make the conclusion inescapable that prices were below the cost of production only because of the Price Administrator's regulation which made sales unlawful at any higher prices and criminal penalties would be imposed where sales were made at higher prices which producers and buyers considered representative of the actual value of the products.

In *United States v. New River Collieries Co.*, 264 U. S. 341, two sets of market prices were involved, those in the domestic market and those for the export market. This Court rejected the lower domestic market prices because they did not provide the monetary equivalent of the property taken or fully indemnify the owner. (pp. 344-345)

The decision of this Court in *Vogelstein & Co. v. United States*, 262 U. S. 337 is instructive. In that case the plaintiff sought to recover from the government on the ground that the market price for his copper was a mere "fiat" price and he should have a higher price. The Court, however, affirmed the judgment of the Court of Claims that the market price did, in fact, represent the actual value of the copper although the market price had been fixed by *agreement* between the War Industries Board and copper pro-

ducers. This Court examined the facts in some detail, pointed out that the plaintiff had actively participated with other copper producers in agreeing to the market price set in the agreement and that the price so agreed on prevailed uniformly during the period when the plaintiff's property was taken. There was not involved in the *Vogelstein case* any regulatory order or fiat price imposed by the government contrary to and against the will of the sellers. On the contrary, the market price was the price agreed to by the sellers and fixed as the uniform price with their consent. There was no contention or suggestion that the price so agreed on was not satisfactory to the producers generally. The reasoning of the Court in that case and the basis of its decision clearly imply that a "market price" imposed without the agreement of the sellers and, in fact, against their will, at a level below the cost of production could not be accepted as a measure of just compensation. The Court rested its decision squarely on the finding that the market price was satisfactory to the sellers as well as the Government.

In the brief for the Government there is no attempt to show that a fair market condition existed at the time plaintiff's property was taken. All the Government has to go on is the fact that in making sales to its own customers plaintiff was unable to charge any more than the maximum price allowed by the Price Administrator. The reasoning here is in a vicious circle:

1. Plaintiff could not under government regulation sell his products for more than was allowed by the Price Administrator.
2. The plaintiff did not close his plant but continued to make sales at the prescribed maximum prices.
3. By so selling his products the plaintiff established such maximum prices as the measure of "just compensation" under the Fifth Amendment.

Under this reasoning the regulation of the Price Administrator, however confiscatory, operates to override the Fifth Amendment.

Just compensation rests on equitable principles and equity and fair dealing are inherent in its determination. *Seaboard Air Line Ry. v. United States*, 261 U. S. 299, 304. Under the argument advanced for the Government the prescribed "market price", above which respondent was not allowed to sell its products to its customers, would be employed as the measure of just compensation regardless of the justice or injustice of such maximum government-prescribed prices. The Government could impose a maximum price and however unfair and confiscatory it might be it would be accepted as the measure of just compensation, because, forsooth, it was the "market price."

The "market prices" prescribed by the Price Administrator do not qualify as the full and perfect equivalent in money of the property requisitioned.

The "market prices" maintained by the Price Administrator at the time of the requisition lacked all those attributes required to make them judicially acceptable as a measure of just compensation. They did not represent the judgment of anyone as to the value of the products. They were not the result of trading by willing sellers and willing buyers in a free or fair market. In fact they were maintained, with the aid of criminal penalties, to prevent sellers and buyers from fixing the value of the products in their trading. The petitioner contends on brief (pp. 20-21) that the value of a commodity is "what it will bring". Here the Government through the Price Administrator, forbade owners of pork cuts to determine what they would bring and enforced the prohibition with criminal penalties.

It was not the policy or purpose of the Price Administrator to determine the worth or value of commodities and to change his maximum prices as the value and worth fluctuated. On the contrary, it was the policy of the Price Administrator to prevent increases in prices above those prescribed regardless of changes in value of such commodities.

Aside from supply and demand, the most basic consideration in the valuation of a staple commodity, such as meat, is replacement cost. Such cost, as well as supply and demand, were completely disregarded by the Price Administrator in his continued maintenance of the original maximum prices on pork cuts in spite of substantial increases in live hog costs which required sales of pork cuts to be at a substantial loss. This policy was applied in his dismissal of the protests against the regulation filed by respondent and 130 other packing companies. (See *supra*, p. 6)

The unacceptability of such "market prices" as a measure of just compensation is conclusively demonstrated by the single fact that an offer of such prices in the market would not buy the products. Respondent sought in vain to buy them in the market. The Government itself was unable to obtain the products by an offer of such "market prices." It was forced to employ compulsory priority and set-aside orders, backed by criminal penalties, in order to obtain its requirements.* The unavailability of offerings at the Price Administrator's "market prices" is readily explained by the fact that such prices were below the cost of production for the industry as a whole as shown by the reports of the Department of Agriculture published at the time and by the public announcement of the Director, Food Distribution Administration. The price "squeeze", as stated by the latter, was "exceptionally acute" (Fdg. 14, R. 8-9). The Department of Agriculture reported not only that the prescribed prices were below the cost of production but that "the wholesale prices for products derived from live hogs were less than the market prices of live hogs." (Fdg. 14, R. 8) Even the Price Administrator formally found that with hog costs at \$15.00 per cwt. the heavy losses under the prescribed maximum prices would force many pork

* Similar compulsory orders have been held by this Court to be takings by eminent domain. *Liggett & M. Tobacco Co. v. United States*, 274 U. S. 215.

slaughterers "sharply to curtail their kill or to discontinue it entirely" (Fdg. 15, R. 9). At the time respondent's products were requisitioned the average price of hogs was \$15.60 per cwt. (Fdg. 13, R. 8)

If such "market prices" be accepted as the measure of just compensation under the Fifth Amendment there would seem to be no limit to the injustice which might be done a citizen by the Government in the confiscation of private property.

The fact that respondent both prior to and after the requisition continued to buy live hogs at prevailing prices and to sell pork products derived from them at the prescribed maximum prices, "even when the cost of live hogs was greater than the wholesale prices of the products obtained from them" (Fdg. 20, R. 11), does not show that respondent considered the pork cuts worth only the price received for them. Respondent had formally protested to the Price Administrator that the prices were unfair and unreasonable (Fdg. 16, R. 10). Its conduct would have placed such a valuation on the products only if its primary purpose had been to obtain such money as the prescribed maximum prices would produce. But this was not the purpose of respondent's conduct. It continued operations instead of closing its plant "in order to protect its good will and the investment in its business, in order to supply customers who were dependent on it and in order to retain its organization of plant and company employees at a time when the labor situation in Philadelphia was very tense" (Fdg. 20, R. 11). Its sales of products at the maximum prices permitted by the regulations cannot be interpreted as evidence that respondent considered its products worth no more.

In view of the fact that demand for pork cuts far exceeded the supply and the cost of live hogs reflected prices for pork cuts above the prescribed maximum prices, it is self-evident that had pork slaughterers, including respondent, been free to charge what willing buyers would have paid in a free market, prices for pork cuts would have been

higher than those maintained by the Price Administrator and would not have been less than reflected by the live hog market. The black market activities referred to by the Price Administrator in his decision dismissing the protests (*supra*, p. 7) support this conclusion. The formal protests of 130 packers and general protests of and on behalf of hundreds of packers against the prescribed prices also demonstrate that in the opinion of the industry the actual value of pork cuts was greater than the maximum prices being maintained at the time of the requisition.

The argument for the Government rests squarely upon the narrow fact that respondent could not sell its products to its customers for more than the maximum prices prescribed by the Price Administrator without risking criminal prosecution. The argument runs that if this is all the products could be sold for, this is all the products were worth. This ignores entirely the reason and purpose of such sales by respondent. If respondent was not to close its plant, jeopardize its investment, discharge its employees, abandon its thousands of customers, and suffer the disastrous loss attending the closing of a large and established business, it was compelled to continue operations. In continuing to operate it was forced to sell its products at not more than the maximum prices prescribed by the Price Administrator. It did not continue operations and produce and sell pork cuts for the purpose of obtaining the maximum prices allowed by the Price Administrator which were less than the cost of production. It did so in the hope of obtaining relief from the below-cost prices of the Price Administrator and in order to prevent the even greater losses which would have resulted from a closing of its plant.

Respondent is entitled to the full and perfect equivalent in money of the products taken. Here this is readily and necessarily measured by the replacement cost.

When valuing a commonplace staple commodity which is readily replaced we have a handy and exact measure of value, namely, the cost of replacement. This measure is satisfactory on both logical and equitable grounds. It measures perfectly the pecuniary equivalent of the property taken. It places the owner in as good a position as he would have occupied if his property had not been taken. In the present case we have involved commonplace staple products, pork cuts derived from hogs. They were readily replaced in the regular course of business by the purchase and slaughter of live hogs. The cost of replacement in the regular course at the time of requisition measures with mathematical exactness the pecuniary equivalent of the products taken. Any lesser award would not be the full and perfect equivalent of the property taken and would not place respondent in as good a position as it would have occupied if its property had not been taken. The rule is eminently fair to the Government. It is asked to pay no more than the cost of production with no other or additional elements of value.

In applying this rule in the present case the Court would be giving consideration to the market value of pork cuts as reflected in the general hog market where prices and values were freely and fairly determined by willing sellers and willing buyers. That market was the only one existing at the time of the requisition which might be described as providing fair market conditions. The rule therefore accords with the traditional judicial practice of employing, when available, the concept of fair market value. However, replacement cost has on numerous occasions been considered by this Court in determining value for judicial purposes. As was stated in a "just compensation" case, *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 125:

"This Court has held in many cases that replacement cost is to be considered in the ascertainment of value, but that it is not necessarily the sole measure of or guide to value."

This Court there quoted (pp. 124-125) the following from *Re Mersey Docks & Admiralty Comrs.* (1920), 3 K. B. 223, 233:

"... (claimant) is entitled to have the property which, but for the action of the Admiralty, would have been in their possession in April, 1917, replaced by the Admiralty. As it cannot be replaced except by the expenditure of money, they are entitled to the amount of money which will represent the cost to them of the replacement. That must be measured with regard to the special circumstances arising from the war, and more especially to the increase in the value of labor and materials which has continued up to the present time."

On either the concept of "fair market value" or "replacement cost", the award of the Court of Claims was correct and should be affirmed.

In petitioner's brief (pp. 12, 17, 18) it is contended that the value of the property determined by the Court of Claims rests "solely on the peculiar value which the property taken had to respondent personally" or on the "special value" of the products to respondent. This is erroneous. The value of the property taken was determined by the Court on basis of the cost of live hogs in the free and general live hog market, national in scope (Fdg. 19, R. 11). The market price of live hogs was not determined by any "special" value "peculiar" to respondent but by the free trading of willing buyers and willing sellers, almost countless in number, dealing in this national market.

Petitioner's argument for "market prices" reduced by a discount is inconsistent and untenable.

The argument for the Government is that just compensation should be measured by the "market prices" which respondent would have received under OPA regulations had sales been made to its customers. But in contending for an award on basis of a market price of \$25,112.50 the Government is forced to discount the lowest prices which respondent need have accepted under the price regulation by an amount of \$1.00 per cwt.

Respondent customarily sold its products in quantities of less than 500 pounds (Fdg. 22, R. 11-12) and there was no provision in the price or other regulations of the Price Administrator which prevented respondent from making sales only in such quantities as it might choose. The "market price" under the OPA price regulation for the requisitioned products when sold in quantities of less than 500 pounds was \$26,362.50. This amount is reduced to \$25,112.50, the price contended for by the Government, by applying a carload discount of \$1.00 per cwt. provided by the price regulation. The theory here is that under the applicable OPA regulation a discount was required for voluntary sales in carload quantities and a similar discount should be imposed upon forced requisitions in carload quantities.

It is seen that the real argument for the Government is that the OPA maximum prices should be imposed in case of requisition regardless of the actual value of the products and regardless even of the "market price" which the Price Administrator's own regulations allowed the owner to obtain for his products. This is plainly inconsistent with the primary proposition of the Government's argument, namely, that the owner is fully compensated when he receives the OPA price which he might have obtained on sales to other purchasers. Respondent was admittedly free to sell the requisitioned products in small quantities and obtain not less than \$26,362.50; but for the

Government it is contended that this "market price" should be discounted \$1.00 per cwt. because the Government chose to requisition in large quantities and the OPA regulation provided a reduced price for voluntary sales in carloads.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the judgment of the Court of Claims should be affirmed.

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APPENDIX.**Act of October 16, 1941.**

Whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 20, 1943, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act * * * but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the fifth amendment to the constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24(20) and 145 of the Judicial Code (U. S. C., 1934 ed., Title 28, secs. 41(20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. * * * (c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 199, 56 Stat. 181)

